

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

ON EMERGENT RELIEF

OAL DKT. NO. EDS 08815-18

AGENCY DKT. NO. 2018-28309

T.T.,

Petitioner

v.

**WEST ESSEX REGIONAL
BOARD OF EDUCATION,**

Respondent.

T.T., appearing pro se

Steven Fogarty, Esq. for respondent (Fogarty & Hara, attorneys)

Record Closed: June 22, 2018

Decided: June 22, 2018

BEFORE **DANIELLE PASQUALE, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner T.T. is a twenty-one-year old (21) young man with an IQ of 81 and diagnosed with Specific Learning Disability (“SLD”). T.T. requests emergent relief in two parts. He argues that he has the credits required to graduate high school and to walk in tonight’s graduation ceremony. The case was transmitted to the Office of Administrative Law (“OAL”) as an application for emergent relief on June 21, 2018; a telephone conference was conducted immediately at 3 p.m. on that date upon my receipt of same and heard the following morning June 22, 2018.

The District concedes that T.T.'s SLD affects his capacity to learn, his ability to stay on task and requires him to be redirected in class. He is also given additional time for tests to achieve passing grades.

T.T. spoke at length about his inability to walk in tonight's graduation and how that would make him feel and he indicated he would be very disappointed. T.T. described and concedes that his mother is dying of amyotrophic lateral sclerosis ("ALS"). He testified that she just wants to "see him graduate high school". He was choking back tears when discussing his mother, describing that when he missed school it was because "mom came first." He explained in detail that "she is the best woman in my life". He explained that his father has pacemaker(s), stents and an additional chronic heart problem and that T.T. is the only one strong enough to get her from the bed to the toilet. He explained about her troubles eating, talking and that she is paralyzed from the waist down. He was forthright, kind and his testimony was heartfelt; as I result, I **FIND** that he was a highly credible witness with regard as to why he was absent and how this would negatively affect him and his family if he could not attend tonight's graduation ceremony. To that end, if he is forced to stay home tonight, T.T. will suffer irreparable harm in that he will feel he is breaking his mother's dying heart and thus I so **FIND**.

This young man explained father that his father who has a heart condition could not appear because he had to care for his mom. He presented a handwritten letter from his dad to this effect. He noted that the family lives off mom's disability and they live rent-free with his grandmother. He explained that his father is applying for disability and cannot work. He stated convincingly that they cannot afford extra help for mom other than the nurse who comes once a week. Other than that, T.T. and his dad are the sole caretakers and T.T. is the only who is strong enough to lift his mom. As T.T. appeared to be a strong twenty-one-year old young man, I **FIND** this explanation to be extremely plausible.

However, where petitioner falls short is his argument that he has met the requirements necessary to graduate. He presented documents but none sufficient to

make up for the excessive absenteeism. Most notably in English where he was absent sixty-seven (67) times with only twenty-six (26) excused absences and seven (7) tardies. In short, the District proved that he does not have all of the credits required to graduate due to excessive absenteeism and thus I so **FIND**.

It should be noted that I have reviewed all corresponding certifications and documentation from both sides in this matter and discussed the matter at length in an attempt to resolve same. I **FIND** that West Essex notified T.T. and his family about his absenteeism issues and gave him many chances to rectify them over the last couple of years. However, it should be noted that T.T. testified credibly that as mom's sickness got worse so did his ability to get to school.

This tribunal and both parties concede and that my determination is controlled by state law which requires an undisputed amount of 120 credits outlined in N.J.S.A. 18A:35-1. It is also undisputed that the District accommodated T.T. by lowering their District standards from 135 credits to 120 credits. The high school administrators made a decision regarding their policy of absenteeism and Vice Principal Julie Hoebee credibly testified that in January she made T.T. aware of the issue and he signed agreement acknowledging same. The District concedes that T.T. never had a family member present although T.T. signed a release for family to be present.

The free appropriate public education required for disabled children must include related services when necessary. 20 U.S.C.A. 1401(9); 34 C.F.R. 300.34(a); N.J.A.C. 6A:14-1.1(b)(3), (d). Related services means:

[T]ransportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services

shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

[20 U.S.C.A. § 1401(26)(A). See 34 C.F.R. § 300.34(a); N.J.A.C. 6A:14-3.9.]

In accordance with N.J.A.C. 1:1-12.6, emergency relief may be granted “where authorized by law and where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case” My determination in this matter is further governed by the standard for emergent relief set forth by our Supreme Court in Crowe v. DeGioia, 102 N.J. 50 (1986), as follows:

The judge may order emergency relief ... if the judge determines from the proofs that:

1. The petitioner will suffer irreparable harm if the requested relief is not granted.
2. The legal right underlying the petitioner’s claim is settled.
3. The petitioner has a likelihood of success on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the relief is not granted.

ANALYSIS AND CONCLUSIONS

The issue before me is two-fold. First, is whether, based on the disputed and the undisputed facts and procedural history before me, the criteria for the granting of emergency relief have been met for graduation requirements and second, whether he is eligible to walk in tonight’s graduation based upon said information. The applicable regulation incorporates the well-established standard for injunctive relief set forth in Crowe v. DeGioia, 90 N.J. 126 (1982):

1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

[N.J.A.C. 6A:3-1.6]

With respect to the first prong, I **FIND** that petitioner will suffer irreparable harm if the requested relief to participate in tonight's graduation is not granted. A graduation is a once-in-a-lifetime event. It is not the type of relief which can be granted at the end of any future plenary hearing because once lost, the opportunity cannot be recaptured. One either attends or one does not, and for T.T., June 22, 2018, is that night for the high school and since he turned 21 in May of this year; this is his absolute last chance. Furthermore, his achievement at overcoming some learning obstacles is one that his family would like to mark with celebration. In addition, and not parenthetically, his mother is dying. Nevertheless, this is just one factor as the privilege of attending graduation is certainly one that can be lost due to excessive absenteeism, poor behavior or other incidents. No behavior issues have been noted in this case in fact, all IEPs and notes from the school indicated that when he does come to school T.T. is polite and contributes to class in a positive way. In short, just absentee issues due to his mother's illness of aggressively-progressing ALS and dad's inability to call the school when certain absences should have been reported.

To that end, this case is an outlier. The District's argument about sending the "wrong message" is misplaced in this scenario. Not only is this student twenty-one, dealing with special education issues with an IQ of 81; his father is disabled, he has few friends, his mother is dying of a crippling disease and he is admittedly one of her main caretakers. Dad was candid with this Tribunal on our telephonic conference that some absences would have been marked excused if he had kept proper paperwork. Surely West Essex is not suggesting that this series of unfortunate events is befalling many students in their population. Dad suggested that T.T. has no friends and the District admitted that T.T. has no behavior issues in the school. This is not your average child

who just refuses to attend school. He is impaired; his father is disabled and applying for disability while taking care of his disabled and dying wife and relies on T.T. to help as well. In fact, dad sent a note to court that he could not attend today's hearing in order to care for his wife, lending more credence to the case that this situation is dire. As a result, this atmosphere is not one conducive to getting this young man to regularly attend school.

I have reviewed the second and third prong together because the merits and rights are intertwined here. Petitioner has a very high burden on this application with respect to proving that this forum is likely to reverse the discretionary determination of the School Administration with respect to their decision pursuant to their policy not to allow students with excessive absenteeism to graduate. The standard is not whether I or any other reviewing court would have imposed a different discipline but whether there was sufficient competent evidence for the Administration to enforce its absentee policy. As I have stated above, there is no earned right of T.T. to receive a diploma, but I cannot see the reason the school would not make an exception under these horrible circumstances to allow his dying mother to see him walk in the last possible high-school graduation.

However, with regard to the second request to receive a diploma, I **FIND** that T.T. cannot overcome the Crowe v. DeGioia factors as it is undisputed that he simply does not have all the requirements met mostly due to his excessive absenteeism and some because they are merely incomplete. In short, T.T. cannot overcome any of the four factors with regard to receiving a diploma he simply did not earn.

From the record as it stands now, it has been conceded by the District that there was written notice at which T.T. or his parents could provide their "version of events" in accordance with state law with regard to his excessive absenteeism with and his right to receive a diploma or walk in graduation. I **FIND** the District's version of events more believable in that no substantial explanation was given. However, the father or other guardian was never present at any such meeting.

On the last prong, I **FIND** that the irreparable harm to T.T.'s not going to the graduation tonight outweighs the district's or the public's interest in maintaining the school policy regarding absenteeism in its school under these unique circumstances. As was undisputed, most of the absences were due to T.T.'s need to help his sick father care for his sick mother, and no negative behaviors have been reported as to T.T. In fact, it is documented many times in the documents submitted by the District that T.T. was well behaved and kind while in school and did not have many friends with whom to cause trouble. Further, dad admits that he had poor record keeping thereby contributing to the excessive absenteeism. I understand the District's contention that allowing T.T. to participate in the graduation ceremony would undermine the authority of District personnel to restrict attendance at these events based on the student's academic attendance record during the school year in question. However, that authority is outweighed by this student's last chance to graduate high school or graduate any other school while his mother is still alive.

In balancing these interests, I **CONCLUDE** that petitioner has satisfied his burden of proof on the Crowe factors with regarding participation in tonight's graduation ceremony and that they weigh in favor of granting the relief sought herein. I **FURTHER CONCLUDE** that T.T. has not met his burden of Crowe with regard to receipt of the actual diploma as T.T. has not met his burden of satisfying the graduation requirements.

ORDER

Accordingly, it is hereby **ORDERED** that the emergent application for relief of the petitioner is hereby **GRANTED in part and DENIED in part**. It is **FURTHER ORDERED** that the District shall permit T.T. to attend tonight, the evening of June 22, 2018, with all the privileges attending that event; however, since the Petitioner cannot show that he was met the graduation requirements he will not receive an actual diploma.

June 22, 2018

DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency

June 22, 2018

Date Mailed to Parties:

June 22, 2018

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